

# 2018 ADVANCED DUI

September 10 - 13, 2018  
Phoenix, Arizona



## ETHICS OF DUI

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ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL  
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# DUI Ethics, Misconduct and other no-no's

APAAC Advanced DUI Seminar  
September 10-13, 2018

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## DUI Cases are Complex

- Umpteen challenges by Defense – DUI Defense is Big Business
  - The Stop – i.e. *Livingston*
  - FST's – HGN, NHTSA certified, non certified, Defendant overweight, elderly, PBT
  - Admonitions, breath test, blood draw, urine
  - Constitutional rights, *Miranda*, access to attorney, second sample
  - Marijuana, drug metabolites, prescriptions

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## DUI Cases are Complex

- Less discretion re: pleas - 28-1387(I)
- Jury Eligible – jury selection/sympathy
- Dueling experts-We need to be familiar with:
  - Biology, Chemistry, studies, assumptions, calculations (yes, math!)
  - Breath, blood, urine
  - Defense Ploys
- Confusing case law, i.e. *Fuenning*, warrants, APC, marijuana etc.

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## FST's



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## APC



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## PBT



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## Prosecutors are Special

- Higher ethical standard
  - Force of government behind us – “With great power comes great responsibility” *Ben Parker, uncle to Peter*
- False convictions are intolerable
- We have broad immunity
- Important societal duty

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## Berger v. United States 295 US 78, 88 (1935)

- The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor — indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

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## ER Rule 3.8 Special Responsibilities of a Prosecutor

- A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons.

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## ER Rule 3.8

- The prosecutor in a criminal case **shall**:
  - (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
  - (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
  - (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
  - (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

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## ER Rule 3.8

- The prosecutor in a criminal case **shall**:
- (e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
  - (1) the information sought is not protected from disclosure by any applicable privilege;
  - (2) the evidence sought is essential to the successful completion of any ongoing investigation or prosecution; and
  - (3) there is no other feasible alternative to obtain the information;
- (f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, **refrain from making extrajudicial comments** that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under ER 3.6 or this Rule.

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## ER Rule 3.3

### CANDOR TOWARD THE TRIBUNAL

- (a) A lawyer shall not knowingly:
  - (1) **make a false statement of fact or law** to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
  - (2) **fail to disclose** to the tribunal **legal authority** in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
  - (3) **offer evidence that the lawyer knows to be false**. If a lawyer, the lawyer's client or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.
- (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is **engaging** or **has engaged in criminal or fraudulent conduct** related to the proceeding **shall take reasonable remedial measures**, including, if necessary, disclosure to the tribunal.
- (c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by ER 1.6.
- (d) In an **ex parte** proceeding, a lawyer shall inform the tribunal of **all material facts** known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

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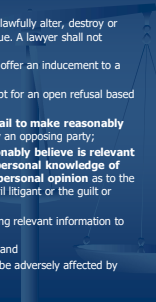
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## ER Rule 3.4

### FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

- (a) unlawfully **obstruct another party's access to evidence** or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
- (b) **falsify evidence**, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
- (c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;
- (d) in pretrial procedure, **make a frivolous discovery request or fail to make reasonably diligent effort to comply** with a legally proper discovery request by an opposing party;
- (e) in trial, **allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or**
- (f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:
  - (1) the person is a relative or an employee or other agent of a client; and
  - (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.



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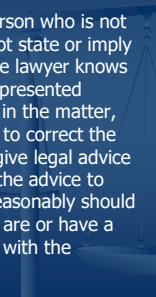
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## ER Rule 4.3

### DEALING WITH UNREPRESENTED PERSON

- In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.



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## UNREPRESENTED DEFENDANTS

..."a defendant's invocation of the right to self-representation does not signal playtime for prosecutors."





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## ER Rule 8.4 MISCONDUCT

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) **engage in conduct involving dishonesty, fraud, deceit or misrepresentation;**
- (d) **engage in conduct that is prejudicial to the administration of justice;**
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable Code of Judicial Conduct or other law.
- (g) file a **notice of change of judge** under Rule 10.2, Arizona Rules of Criminal Procedure, **for an improper purpose**, such as obtaining a trial delay or other circumstances enumerated in Rule 10.2(b).

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## Prosecutorial Misconduct

Prosecutorial misconduct is anything that the prosecutor does, or fails to do, that tends to deprive the defendant of a fair trial.

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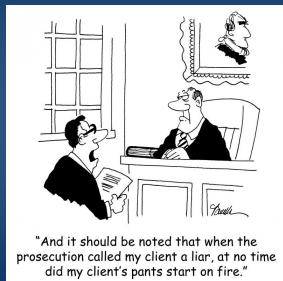
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## Prosecutorial Misconduct

### The Consequences of Prosecutorial Misconduct

Misconduct alone is not sufficient to award a new trial. However, when a court determines that a defendant was **denied a fair trial**, it can take one of several actions:

- Reverse a conviction
- Grant a mistrial (state may then be barred from retrying the defendant)
- Dismiss the case with prejudice

In addition to the effect on the defendant's case, a finding of prosecutorial misconduct can negatively impact the prosecutor. A judicial determination of prosecutorial misconduct can not only tarnish a prosecutor's reputation, **it can lead to disciplinary action by the State Bar, including disbarment.**

*State v. Peasley*, 208 Ariz. 27 (2004)

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## Misconduct-Charging

- Cannot Increase Defendant's Charges for Exercising Rights

State v. Brun, 190 Ariz. 105 Ct. App. 1997 - The defendant was arrested for misdemeanor DUI. At the time of the arrest the officer noted that he had a revoked license b/c of two priors out of Illinois. The defendant set his case to trial and filed a motion to suppress. The state dismissed the misdemeanor DUI and filed a felony DUI on defendant. The defense filed a motion to dismiss based on prosecutorial vindictiveness. The trial court agreed and found that the facts "support or indicate a realistic likelihood of vindictiveness without the Defendant having to actually prove vindictiveness." Yikes.

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## Misconduct-Charging

- Cannot Increase Defendant's Charges for Exercising Rights

Brun con't - "Prosecutorial vindictiveness" occurs when the government retaliates against a defendant for exercising a constitutional or statutory right. United States v. Meyer, 810 F.2d 1242, 1245 (D.C.Cir.1987). "To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort, and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is 'patently unconstitutional.'" Bordenkircher v. Hayes, 434 U.S. 357, 363, 98 S.Ct. 663, 668, 54 L.Ed.2d 604 (1978) (citations omitted).

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## Misconduct-Charging

### ■ Cannot Increase Defendant's Charges for Exercising Rights

Brun con't - A defendant may prove prosecutorial vindictiveness by "proving 'objectively that the prosecutor's charging decision was motivated by a desire to punish him for doing something that the law plainly allowed him to do.'" State v. Tsosie, 171 Ariz. 683, 685, 832 P.2d 700, 702 (App.1992) (quoting United States v. Goodwin, 457 U.S. 368, 384, 102 S.Ct. 2485, 2494, 73 L.Ed.2d 74 (1982)). **Because actual vindictiveness is difficult to prove, "a defendant in some circumstances may rely on a presumption of vindictiveness."** Id. at 685, 832 P.2d at 702 (citing Blackledge v. Perry, 417 U.S. 21, 27-28, 94 S.Ct. 2098, 2102, 40 L.Ed.2d 628 (1974)); see also Meyer, 810 F.2d at 1245.

## Misconduct-Charging

### ■ Cannot Increase Defendant's Charges for Exercising Rights

Brun con't - In this case, the Court of Appeals overruled the trial court and found that there was no vindictiveness.

- Increasing charges after Def. exercises a legal right alone does not give rise to a presumption of vindictiveness
- BUT when additional facts combine with this sequence of events to create such a realistic likelihood, a presumption will lie in the pretrial context
- BE CAREFUL!

## Misconduct-Charging

### ■ Cannot Increase Defendant's Charges for Exercising Rights

- State v. Mieg 225 Ariz. 445 (App. 2010) - Not a DUI case, but same principles. Defendant stopped for traffic violations. Arrested for PODP, officers found meth. Def. only charged w/ PODD, not PODP.
- Evidence of PODP suppressed as not relevant, mistrial when officer mentions it. State refiles with both charges this time, court dismissed indictment based on prosecutorial vindictiveness.
- Ct. App. Held no vindictiveness, not done solely to punish def., prosecutor could not anticipate suppression of PODP evidence, and adding PODP charge solves state's suppression problem.
- Again, BE CAREFUL!

## Misconduct - Plea Negotiations

- Generally, there is no right to a plea bargain. A prosecutor may choose to plea bargain or not, depending upon the policies and standards of the office.
- But a prosecutor cannot base plea offers on race, religion, or other arbitrary factors.
- Prosecutors may not refuse to plea bargain out of animus to the defense attorney.

*State v. Martin*, 139 Ariz. 466 (1984)

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## Disclosure Responsibilities – Ethical Rules

- ER 3.8 (d) The prosecutor SHALL make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

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## Disclosure – Case Law

- *Brady v. Maryland*, 373 U.S. 83 (1963) - Any material evidence which would tend to reduce or negate the defendant's guilt *must* be disclosed.

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## Disclosure – More Case Law

- Favorable Evidence Must be disclosed
  - "The prosecution is duty bound to disclose evidence favorable to the defense **whether or not defendant requests it.**"  
*State v. Altman*, 107 Ariz. 93 (1971).

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## Disclosure

- *American Bar Association Formal Opinion 09-454*, July 8, 2009 - Duty to Disclose May Be **Greater** Under the Ethical Rules - "[T]he ethical obligation is more demanding than the constitutional obligation."

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## Disclosure

- Arizona Rules of Criminal Procedure, Rule 15.1(b)(8)  
Prosecutor shall disclose "All then existing material or information which tends to mitigate or negate the defendant's guilt as to the offense charged, or which would tend to reduce the defendant's punishment therefore."

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## Other Pitfalls

- Refusal – OK to mention for FST's or failure to submit blood, breath or urine, but DON'T comment on defendant's right to remain silent
- Second Sample – OK if defendant requests and obtains sample for independent analysis, OR if defense attacks validity of state's test. MAKE SURE there is enough for additional testing!
- *Fuenning*
- Vouching – Superiority of blood test
- Experts – Can't attack with non-evidence or baseless accusations

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## Do Justice



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